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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 296

MEARL C. TILLMAN AND EMILY P. TILLMAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon (R. 127–138; Pet. App. 31–41) is not reported. The opinion of the Court of Appeals (Pet. App. 41–48) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1956 (Pet. App. 48). A timely petition for rehearing was denied on May 15, 1956. The petition for a writ of certiorari was filed on August 1, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the courts below correctly held that, on the concurrent fact findings which petitioners dispute, and as a matter of the local law which applies under the Tort Claims Act, the United States was not liable for the flood damage sustained by petitioners.

2. Whether, in light of the Flood Control Act of 1928, the United States can be held liable for flood damage resulting from the 1948 flood of the Columbia River and its tributaries.

STATUTES INVOLVED

The pertinent provisions of the Federal Tort Claims Act (28 U. S. C. 1346 (b), 2671, *et seq.*) and of the Flood Control Act of 1928 (45 Stat. 534, 535, 536 (33 U. S. C. 702c)), are set forth in the Appendix, *infra*, pp. 19–20.

STATEMENT

During the latter part of May, 1948, the Columbia River and its tributaries in the Pacific-Northwest were in flood. More than fifty cities and towns, together with suburban and agricultural areas, were affected to a greater or lesser degree. During the high water period more than 10,000 persons participated in a flood fight which involved 475 miles of levees protecting approximately 200,000 acres of land. Before the flood was over, it caused property damage estimated at $100,000,000, and 400,000 acres of land were inundated, including the land encompassed by Oregon Peninsula Drainage Districts No. 1 and No. 2 (R. 80–82). The present litigation is the outgrowth of the flooding of Drainage District No. 2. This case

is the pilot case for 52 property damage claims against the United States which were consolidated in the District Court for the purpose of determining government liability (R. 13, 139).

1. *Peninsula Drainage Districts Nos. 1 and 2.*— Peninsula Drainage Districts Nos. 1 and 2 are located on the outskirts of Portland, Oregon, along the southern bank of the Columbia River, approximately five miles above the confluence of the Columbia and Willamette Rivers (R. 15, 16). The area between the confluence of the rivers is open land subject to flood during periods of high water. District No. 1 is protected on three sides by levees: on the north along the river (R. 30), on the south along Columbia Slough (R. 31), and on the west by the western embankment, so-called, a structure consisting of two railroad fills and a highway fill (R. 38). Along the eastern boundary of District No. 1 is a highway known as Denver Avenue, and beyond and to the east of the highway is Drainage District No. 2 (R. 16). District No. 2 is surrounded by its own levee system: on the north along the river (R. 16), on the south along Columbia Slough (R. 16) and on the east along an excavated channel known as the City Cut. The combined levee systems of the two Districts completely enclose both Districts Nos. 1 and 2. Along the western boundary of Drainage District No. 2, as noted above, lies Denver Avenue (R. 16). See map, Pet. App. 63.

Peninsula Drainage District No. 1, the downstream district, was organized on June 1, 1917 (R. 25). At that time the fill which carries Denver Avenue was

already in existence (R. 30) and the railway fills along the west side of the district were, or were about to be, constructed (R. 30). Shortly thereafter, on September 25, 1917, District No. 2 was organized (R. 17, 302–333). During the following year the District No. 1 levees were completed (R. 30–31) and within a year or two District No. 2 had built levees on the north, south and east (R. 17), thus completing the levee protection for the two Districts. In the period between 1936 and 1941, the Corps of Engineers raised and reconstructed the north and south levees of District No. 1 (R. 32, 35) and the north, south and east levees of District No. 2 (R. 19, 22). The work of the Corps of Engineers at District No. 1 was completed in 1941 (R. 34), and at District No. 2 in 1940 (R. 22). The levees surrounding both drainage districts do not belong to the United States (R. 22, 35).

2. *Denver Avenue.*—Highway traffic going north from Portland crosses the Columbia River on the so-called Interstate Bridge. Denver Avenue, the boundary running north and south between District No. 1 and District No. 2, and the fill supporting it were constructed in 1915 and 1916 as an approach to this bridge by Multnomah County at the expense of the Interstate Bridge Commission (R. 22).[1] The In-

[1] The fill was constructed on a right-of-way conveyed in fee to Multnomah County by Peninsula Industrial Company by a deed dated March 16, 1915 (R. 23, 455). The deed also granted slope easements to the county, that is, the right to locate the slopes of the fill on the adjoining property of the grantor (R. 457). The deed reserved to the grantor the right to construct public and private highway crossings (R. 458), railroad tracks (R.

terstate Bridge Commission transferred control of Denver Avenue to Multnomah County on January 1, 1929 (R. 27). On March 26, 1937, the Oregon State Highway Commission took charge of Denver Avenue and on that date Denver Avenue became an Oregon state highway (R. 27). Since then, Denver Avenue has been owned by the State of Oregon and controlled by the Oregon State Highway Department (R. 28). Denver Avenue has been in regular use as a public highway since it was first constructed in 1915 and 1916 (R. 28). It is one of the principal approaches to the Interstate Bridge (R. 245) and it is heavily traveled.

(a) *The Denver Avenue Underpass.*—During the summer of 1942 Kaiser Company, Inc., in order to provide war housing for its shipyard employees (R. 45), contracted with the Federal Public Housing Authority to construct, within District No. 1, on a cost-plus-a-fixed fee basis, a housing project known as Vanport (R. 47). Since Vanport was to provide housing for several thousand persons (R. 47), highway access to and from the area had to be provided. Denver Avenue, which parallels the project, was avail-

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458), underground pipes and conduits (R. 459) and two deep water channels "not to exceed one hundred (100) feet in width" across, under or through the right-of-way (R. 459). The deed went on to provide that it was made upon the express condition "that the said Multnomah County shall within three (3) years from the date of this conveyance construct or cause to be constructed and thereafter maintained * * * a fill and embankment" on the property "and shall, within said period, provide and thereafter maintain a public highway over said Parcel B which shall be reasonably sufficient for the accommodation of public travel thereover * * *" (R. 461-2).

able for this purpose. But because of the heavy traffic on Denver Avenue to and from the Interstate Bridge any arrangement whereby Vanport traffic would cross Denver Avenue traffic at grade would have been "highly dangerous" (R. 246, 283). Accordingly, the Kaiser interests proposed to the Oregon State Highway Commission that an underpass be constructed through Denver Avenue, thus permitting the Vanport traffic to enter Denver Avenue without crossing it (R. 283). The Highway Commission approved this proposal (R. 246) and furnished detailed plans and specifications for the underpass (R. 49, 288, 290, 292). The underpass was constructed in accordance with the Commission plans (R. 49) under the supervision of a Commission engineer (R. 50). The actual work was done by a Portland contractor (R. 49) under a contract (R. 259–281) with Kaiser approved by the Federal Public Housing Authority (R. 281). Work on the underpass began in November, 1942, and was completed in February or March, 1943 (R. 49–50).

(b) *The ring levee.*—By condemnation proceedings, commenced January 12, 1943, the United States acquired 4.53 acres of land in the area to the east of the Denver Avenue underpass (R. 58). On January 7, 1944, the United States filed a petition for condemnation and obtained possession of 136.11 acres to the east of Denver Avenue on which was constructed a temporary housing development known as East Vanport (R. 58).

About the time the Denver Avenue underpass was being constructed, a semi-circular ring levee was built around and to the east of the underpass (within District No. 2) on land owned by the United States (R. 58). The work was done by the contractors working on the underpass (R. 50). The ring levee was completed in April, 1943 (R. 50). In the fall of 1943, a Portland contractor, acting pursuant to arrangements with one of the Vanport subcontractors and in accordance with plans prepared by Kaiser Company, Inc., raised the elevation of the ring levee, widened its top and placed a clay blanket on its eastern or outside slope (R. 50–51, 296, 301). In the spring of 1944 employees of the Housing Authority of Portland (HAP), the lessee of the Vanport and East Vanport housing projects, discovered cracks and sloughs in portions of the ring levee (R. 54). In the summer or fall of that year, HAP employees repaired the levee by capping the crown, reworking the areas where sloughs had occurred and filling in the cracks (R. 54). There was no further difficulty with the levee (R. 418) prior to May 31, 1948 (R. 54).

3. *The flooding of Districts Nos. 1 and 2.*—On the afternoon of May 30, 1948, the railroad and highway fills which constituted the western embankment at District No. 1 failed (R. 80), permitting flood water to fill District No. 1 (R. 81), thereby flooding and destroying Vanport. The following morning, District No. 2 was evacuated by order of the Oregon Governor (R. 81).

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As the flood waters filled District No. 1 they advanced across the district and began to exert pressure on the Denver Avenue fill and, by passing through the Denver Avenue underpass, on the ring levee. Trouble first developed, not with the ring levee, but with the fill itself at the site of a large culvert, approximately five feet by five feet in size, constructed through the fill at about ground level (R. 53). The flood water blew out the plugs in the culvert and the fill began to cave and slough (R. 184, 209–210, 217, 248), but the culvert was replugged, thus averting a failure at that point. Shortly thereafter, however, the ring levee suddenly broke, permitting the flood water to enter District No. 2 (R. 81).

The failure of the ring levee permitted the flood waters to advance across District No. 2 from Denver Avenue to Union Avenue, another highway fill so located that it bisects the District in a diagonal fashion (R. 55). Union Avenue held the water for two or three hours; then it, too, failed (R. 81), permitting the flood to inundate the entire District and thus to contribute to the damage which gave rise to these actions (R. 81).

4. *Proceedings in the courts below.*—The complaint in this case (R. 3–8) was filed on December 15, 1949. The jurisdiction of the District Court was invoked under the Federal Tort Claims Act (R. 3). So far as is now material, it was alleged that flood damages totalling $6,987.45 were sustained by petitioners "because of the wrongful and tortious act of the Federal Public Housing Authority and the U. S. Army Corps of Engineers, as agents and instrumen-

talities of the defendant, in cutting, severing and removing a portion of said Denver Avenue levee" as a result of which "the levee was rendered useless as a protection against the flood waters" (R. 6–7).

The case was tried by the District Court primarily upon an agreed statement of facts (R. 14–84), incorporated in the court's pre-trial order (R. 13) and adopted as part of its findings of fact (R. 139). In addition to the agreed facts, the District Court, *inter alia* (R. 139–146), found that the sole cause of the damage complained of was the failure of the western embankment of District No. 1 which had been adopted by both Districts Nos. 1 and 2 as one of the flood protective works; that the western embankment was not built by the United States; that the United States did not own the ground on which it stood, and did not on the date of failure, or previously, exercise any control over the structure (R. 142). The court found that Denver Avenue was built and has ever since been used for highway purposes; that it was not intended to be a levee and was not designed as a water-repellent wall or structure; that the Plan for Reclamation of District No. 2 stated that no reliance was placed on Denver Avenue and Denver Avenue is mentioned only casually as furnishing additional protection; that between 1934 and 1944, the United States, through the Corps of Engineers, reconstructed the north, south and east levees of District No. 2, which approved the plans but made no request that Denver Avenue be strengthened as part of the protective works; that neither Multnomah County, the State of Oregon, nor the United States had any obligation to

maintain Denver Avenue as a levee or for flood protection purposes (R. 143).

The court further found the water which inundated District No. 2 approached Denver Avenue from the west, *i. e.,* from downstream; that, in the exercise of due care, there was no reason to anticipate the failure of the western embankment of District No. 1 and no reason to anticipate that flood waters would ever approach Denver Avenue from the west; that no one contemplated Denver Avenue as a bulwark against a weight of water such as was cast against it when the western embankment broke; that the failure of the ring levee and the inundation of District No. 2 resulted from a set of circumstances unforeseen and, in the exercise of due care, unforeseeable (R. 143–144); and that the construction of the underpass and the failure to provide an unbreakable ring levee was not the cause, proximate or otherwise, of any damage to petitioners (R. 144).

The court went on to find that there was a failure of proof of any negligence or wrongful act on the part of the United States or its employees; that there was a failure of proof that the construction of the underpass or the construction and maintenance of the ring levee violated any right of petitioners, or that the ring levee was not constructed for a proper purpose or was inadequate for the purpose intended (R. 145–146).

As a matter of Oregon tort law, the District Court, upon the facts as agreed and as found, denied recovery (R. 146–147) and further concluded that 33 U. S. C.

702c (Appendix, *infra*, p. 20), which precludes the imposition of liability for flood damage upon the United States, was an absolute defense to the actions (R. 147).

On appeal, the Court of Appeals affirmed (Pet. 48). The appellate decision rests upon two grounds: (1) that "the findings of the trial court are fully substantiated by the transcript of record" and preclude recovery (Pet. App. 45), and (2) in accordance with the ruling in the prior litigation arising from the flooding of District No. 1,[2] that 33 U. S. C. 702c bars recovery on these claims from the United States (Pet. App. 45–46).

ARGUMENT

Applying conventional principles of local tort law to the particular facts of this case, both courts below have agreed that there is no factual or legal basis for the imposition of liability upon the United States. As an additional, independently sufficient ground of decision, they also agreed that petitioners' claims are precluded by the express statutory prohibition against holding the United States liable for flood damage. These concurrent rulings are clearly correct, and there is neither a conflict nor any other basis for further review by this Court.

1. (a) The District Court found as a fact (R. 143; Pet. App. 52), and the Court of Appeals agreed (Pet. App. 46–47), that the sole and proximate cause of petitioners' damage was "the failure of the western embankment at District No. 1" (R. 142; Pet. App.

[2] *Clark* v. *United States*, 218 F. 2d 446 (C. A. 9).

52). It was further found and agreed that the land on which the western embankment rests "does not belong to the United States" (R. 42, 142) and that the embankment was not built, maintained or controlled by the United States (R. 142; Pet. App. 52).

The Tort Claims Act, following the general tort rule, permits the imposition of tort liability upon the United States only when the damage complained of is "*caused* by the negligent or wrongful act or omission" of a Government employee. 28 U. S. C. 1346 (b) (emphasis added). Here, no negligent act of the United States or its employees was in any way associated with the failure of the western embankment. Clearly, therefore, there is no basis in fact for holding the United States responsible for petitioners' damage, proximately caused by the failure of the embankment. *Schutt* v. *Hull*, 193 Or. 18, 236 P. 2d 937; *Cosgrove* v. *Tracey*, 156 Or. 1, 64 P. 2d 1321; *Aune* v. *Oregon Trunk Ry.*, 151 Or. 622, 51 P. 2d 663; *Restatement of the Law, Torts*, § 430.

(b) Inquiry as to the Government's liability for petitioners' damage might well end with the factual determination that the sole cause of petitioners' damage was the failure of the western embankment, for which the United States was in no way responsible. It should be noted, however, that apart from this weakness, there are additional factual answers to petitioners' claim.

Petitioners' contention that the severance of the Denver Avenue fill and the construction of the underpass were wrongful is based upon the premise that the

Denver Avenue fill was designed as a levee for flood protection, rather than for highway purposes as found by the District Court (R. 142–143; Pet. App. 53). Since the underpass was built "by contractors under the sole supervision, jurisdiction and control of the Oregon State Highway Commission" (Pet. App. 47), it is difficult to see how petitioners' argument in this respect materially advances their claim against the United States. But in any event the underlying premise that Denver Avenue was a levee finds no evidentiary support in the record.

The Denver Avenue fill was built before Drainage Districts No. 1 and 2 were organized (R. 17, 22, 25). While it ultimately became a common boundary between the two Districts, it was built exclusively for highway purposes by the County of Multnomah, at the expense of the Interstate Bridge Commission, as a vehicular approach to the Interstate Bridge (R. 22).[3] It has always been used for highway purposes (R. 28). Prior to May, 1948, Denver Avenue was never considered to be a levee or dike by Drainage District No. 2 (R. 334–338, 339, 342, 344) for the obvious reason that, while Denver Avenue was a common boundary between Districts Nos. 1 and 2, the flood protection of both Districts was from the combined levee systems which completely enclosed both Districts. Moreover, neither the County of Multno-

[3] See the right-of-way deed of 1915 (R. 455–463) and the correction deed of 1926 (R. 465–468), which make it clear that the conveyance to Multnomah County in 1915 was primarily for highway purposes.

mah (R. 455–463, 465–468), the State of Oregon nor the State Highway Commission (R. 246–247, 255, 289–290) regarded the Denver Avenue fill as a dike or levee. And since it was not intended to be a dike or levee, the fill was not constructed as a dike or levee (see R. 53), nor was it maintained by either District as the levees surrounding the Districts were maintained (R. 19–22, 32–35).

In short, the record amply supports the finding of the District Court, sustained by the Court of Appeals, that neither the County of Multnomah, the State of Oregon, nor the United States had any "obligation to maintain Denver Avenue as a levee or for flood protection purposes" (R. 143; Pet. App. 53). And because Denver Avenue is a State highway, on land owned by the State and maintained by the State (R. 27–28), there was, of course, no impropriety or breach of petitioners' rights, when, at the suggestion of Kaiser Company, Inc., (R. 48–49), and according to plans drawn up by the State and under State supervision (R. 246), the Denver Avenue underpass was constructed by private contractors (R. 49) under a contract with Kaiser Company, Inc., approved by the Federal Public Housing Administration (R. 281).

It is universally recognized that one of the essential elements of a tort action is that the conduct complained of must have invaded an interest which is entitled to protection. The same element is essential to a recovery against the United States under the Tort Claims Act. 28 U. S. C. 1346 (b), 2674, Appendix, *infra*, pp. 19, 20. Here, it not only appears that the severance of the fill and the construction of the

underpass, of which petitioners' complain, were not the acts of employees of the United States, but, as found by the courts below, that the United States owed no duty to District No. 1 or 2 to provide flood protection in any form whatsoever. *Clark* v. *United States,* 218 F. 2d 446, 452 (C. A. 9). In these circumstances, there is no room for quarrel with the judgments of the courts below. *Restatement of the Law, Torts,* § 281; *Prosser on Torts,* p. 177 ff; *Palsgraf* v. *Long Island R. Co.,* 248 N. Y. 339, 341, 162 N. E. 99.

Nor did the United States become obligated to furnish flood protection to petitioners by the erection of the ring levee on land condemned by the United States. With respect to the ring levee the District Court found that its purpose was to afford some protection to District No. 1 against the possible overflow of the upriver dikes of District No. 2 to the east of the ring levee, which were lower than the levees of District No. 1 (R. 43–44, 141; Pet. App. 52). There was no proof that the ring levee was inadequate for this purpose or improperly repaired or maintained (R. 145; Pet. App. 55). Though contradicted, there was expert testimony that the ring levee afforded secondary protection to District No. 2 against water coming from the west comparable or superior to that afforded by the Denver Avenue fill (R. 227–228, 243). And, though again there is testimony to the contrary (R. 205), R. H. Baldock, the chief engineer of the State Highway Commission, and Harry K. Doyle from the Corps of Engineers, both of whom participated in the Denver Avenue

flood fight, testified that in their opinion the Denver Avenue fill, even in absence of the underpass, would itself have failed if the ring levee had not (R. 217, 249).

The flood waters approached from the west because of the unforeseeable failure of the western embankment of District No. 1 (R. 219, 224, 237, 414, 423). And as the District Court found, even Denver Avenue was not contemplated as a "bulwark against a weight of water such as was cast against it when the western embankment at District No. 1 broke" (R. 143; Pet. App. 54). In short, the failure of the western embankment, the failure of the ring levee, the failure of Union Avenue fill (R. 81–82), the complete inundation of District No. 2 and, finally, petitioners' damage, were the result of a set of circumstances unforeseen and unforeseeable by anyone, including petitioner (R. 143–144; Pet. App. 54). The United States and its employees breached no duty owing to petitioners and no negligent or wrongful act of Government employees has been shown to support a tort claim against the United States. Though petitioners argue extensively (Pet. 12–24) with the amply supported concurrent findings requiring the judgment below, their factual arguments present no basis for review by this Court. *Comstock* v. *Group of Investors,* 335 U. S. 211, 214.

2. While the foregoing considerations are dispositive of the case, both courts below were in agreement that 33 U. S. C. 702c, App., *infra,* p. 20, is,

independently, an additional bar to recovery on petitioners' flood claims asserted against the United States. 33 U. S. C. 702c, in pertinent part, provides that: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *" This statutory provision has the effect of immunizing the United States from flood damage liability (*National Mfg. Co.* v. *United States*, 210 F. 2d 263 (C. A. 8), certiorari denied, 347 U. S. 967; *Clark* v. *United States*, 218 F. 2d 446 (C. A. 9)), and defeats petitioners' suit.

3. The question decided by this Court in *Indian Towing Co.* v. *United States*, 350 U. S. 61, is not even remotely involved in this case. As shown above, the decision of the Court of Appeals denying recovery rests upon the application of settled principles of local tort law to facts peculiar to this case and upon the statutory prohibition against governmental liability for flood damage. There is not the slightest warrant for petitioners' assertion that the decision here is in conflict with *Indian Towing*.[4]

[4] Neither is there merit to the constitutional questions which the petition seeks to raise. The complaint that petitioners were denied a fair trial (Pet. 26–28) comes for the first time in this Court, and is frivolous. The claim that the construction of the Denver Avenue underpass, in 1942 and early 1943, was a taking of petitioners' property without just compensation or due process of law (Pet. 28) is also baseless, and, in any event, such a claim was barred by limitations when this Tort Claims Act suit was filed on December 15, 1949. 28 U. S. C. 2401 (a).

CONCLUSION

The decision of the Court of Appeals is correct and there is no conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1956.

APPENDIX

1. The pertinent provisions of the Federal Tort Claims Act, as codified in 28 U. S. C., provide:

SECTION 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

SECTION 2671. *Definitions.*

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, tempo-

rarily or permanently in the service of the United States, whether with or without compensation.

* * * * *

SECTION 2674. *Liability of United States.* The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

2. The 1928 Flood Control Act provides in pertinent part (Act of May 15, 1928, 45 Stat. 534, 535, 536 (33 U. S. C. 702c)).

Section 3.

* * * * *

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

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